INTERIOR BOARD OF INDIAN APPEALS

Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs

27 IBIA 8 (11/14/1994)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

FRIENDS OF THE WILD SWAN
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-181-A Decided November 14, 1994

Appeal from the imposition of an appeal bond.

Docketed; affirmed as modified.

1. Indians: Lands: Generally--Indians: Lands: Environmental Impact Statements--National Environmental Policy Act of 1969: Generally

   Actions taken by the Bureau of Indian Affairs on lands held in trust for an Indian tribe or individual are subject to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1988).

2. Indians: Generally--Regulations: Generally

   A specific provision in Bureau of Indian Affairs program regulations will normally supersede a general regulation dealing with the same subject.

3. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rulemaking--Indians: Generally--Regulations: Force and Effect as Law

   A specific reference in duly promulgated regulations to the applicability of a section of the Bureau of Indian Affairs Manual allows that section to be relied on, used, and cited as precedent by the agency in cases arising under those regulations.

APPEARANCES: Arlene Montgomery, Swan Lake, Montana, and Kathy M. Togni, Washington, D.C., for appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Friends of the Wild Swan seeks review of an August 11, 1994, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), imposing a $29,000 appeal bond (bond). The bond was required in connection with appellant's appeal from a July 1, 1994, decision issued by the Flathead Agency Superintendent, BIA (Superintendent), approving a

Finding of No Significant Impact (FONSI) in relation to the Yellow Bay Timber Sale (timber sale) on the Flathead Indian Reservation in Montana. 1/ The FONSI was issued under the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335 (1988). 2/ For the reasons discussed below, the Area Director's imposition of a bond is affirmed, but the amount of the bond is reduced to $27,619.

Background

On August 8, 1994, the Area Director received a notice of appeal from appellant challenging the FONSI prepared for the timber sale. By memorandum dated August 11, 1994, the Superintendent requested that the Area Director impose a bond in the amount of $29,000. The memorandum states:

> The basis for this figure is as follows:
>
> INTEREST: Interest cost to Tribes as a result of borrowing from reserve accounts to replace the $650,000 in lost revenue for this fiscal year. Delay in receipt of funds is estimated to be a minimum of 10 months, with cost of capital being 5% per annum. ($27,619)
>
> SALE PACKAGE REVIEW AND RECONCILIATION: 20 Man-hours for GS-9 Forester to recompile sale package necessary after dates, sale minimums, and other pertinent items change. ($385)
>
> COPYING AND MAILING COSTS FOR FUTURE SALE ($100)
>
> SALE RE-ADVERTISEMENT AT A FUTURE DATE IN 5 PAPERS ($900)

The Area Director imposed a bond on August 11, 1994, stating:

> In accordance with 25 CFR 2.5 [3/] I am requiring an appeal bond of $29,000 in the form of cash, Irrevocable Letter of Credit,

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1/ The Forest Officer's Report for the timber sale, which is included in the administrative record, indicates that the sale was to cover 663 acres held in trust for the Confederated Salish and Kootenai Tribes (Tribes) and 22 acres held in trust for individual Indians. For all practical purposes, this was a sale of tribal timber.

2/ All further citations to the United States Code are to the 1988 edition.

3/ Section 2.5 provides in pertinent part:

"(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

"(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal."

> or Negotiable U.S. Government Securities. You are directed to furnish the bond * * * by C.O.B., August 30, 1994. Failure to post the $29,000 appeal bond * * * will result in dismissal of your appeal. 25 CFR 2.17(b) (2). [4/]
>
> Alternatively, you may advise me in writing by C.O.B., August 30, 1994 that you elect not to post the appeal bond. In that event, pursuant to 25 CFR 163.26 [5/], I shall direct that there is no stay of action pending my decision of your appeal, and that the Yellow Bay Timber Sale contract may be awarded, approved and harvested under contract terms.

(Letter at 1). The Area Director also informed appellant of its right to appeal to the Board.

Appellant elected to file a notice of appeal, which the Board received on August 30, 1994. Because of the appeal, the Area Director took no further action in regard to the bond, in accordance with 43 CFR 4.314(a), which stays the effect of an Area Director's decision when an appeal is filed with the Board. Accordingly, the present posture of this matter is that no bond has been posted pending the Board's decision, and the underlying appeal from the Superintendent's FONSI decision is before the Area Director.

Appellant filed a detailed statement of its position with its notice of appeal. In its August 31, 1994, predocketing notice, the Board indicated its intention to expedite consideration of this appeal. The Area Director filed a statement of his position in a September 2, 1994, request for expedited decision. Both appellant and the Area Director filed supplemental statements.

Discussion and Conclusions

[1] The Board begins its analysis of this appeal with the undisputed conclusion of law that BIA actions in regard to lands held in trust for the benefit of an Indian tribe or individual are subject to NEPA. See, e.g., Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); Davis v. Morton,

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4/ Section 2.17 provides: "(b) An appeal under this part may be subject to summary dismissal for the following causes: * * * (2) If the appellant has been required to post a bond and fails to do so."

5/ Section 163.26 states in pertinent part:

"Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Such appeals shall be filed in accordance with the provisions of 25 CFR part 2, Appeals from Administrative Actions, or any other applicable general regulations covering appeals."

469 F.2d 593 (10th Cir. 1972). The Department explicitly recognized its NEPA obligations in regard to timber sales from trust lands in 25 CFR 163.27, which provides:

> Before implementing these regulations, forestry personnel will review their timber sale activities for potential environmental impacts in accordance with [NEPA] and applicable Council on Environmental Quality [CEQ] regulations (40 CFR 1500-1508). NEPA compliance is further explained in Departmental Manual Part 516 DM (Environmental Quality) and 30 BIAM [Bureau of Indian Affairs Manual] Supplement 1 (NEPA Handbook) * * *, from which specific guidance is obtained.

Amendments to 25 CFR Part 163, the General Forestry Regulations, were proposed in 1983. Section 163.27 was not included in the proposal. See 48 FR 11459 (Mar. 18, 1983). The preamble to the final rule states: "Several commenters noted that requirements for environmental protection were inadequately referenced. The Bureau considered this and agrees. Consequently, a new § 163.27 is added to clearly affirm the Bureau's policy concerning compliance with environmental quality and requirements relative to the General Forest Regulations" (49 FR 1686 (Jan. 13, 1984)). BIA acknowledged its responsibilities under NEPA in this case by preparing the FONSI which is the subject of the appeal pending before the Area Director.

Despite appellant's expressed belief that BIA did not understand and/or fulfill its NEPA obligations in this case, the Board emphasizes that the merits of the FONSI are not presently before it. It will not consider here any issues or arguments relating to the FONSI.

Appellant raised different, although sometimes interrelated, arguments in its notice of appeal and supplemental statement. Appellant's arguments can be divided into three major categories: (1) the bond is not appropriate, (2) the bond should be waived, and (3) BIA has interfered with appellant's right to appeal. The Board will address these arguments in the order just listed, without specifying where, or in what order, appellant raised each argument.

Appellant contends that the bond is not reasonable within the meaning of 25 CFR 2.5(a) because appellant was required to post a cash, or cash-equivalent, bond on only 15 days' notice. In general support of this argument, appellant cites United States of America v. Kombol, No. C86-1764 (M)WD (W.D. Wash. June 15, 1989), in which the court remanded a case to the Department after finding, in appellant's words, that an "appeal bond requirement had the effect of unreasonably depriving Kombol of his right to appeal" (Supplemental Statement at 4). Appellant apparently contends that an appeal bond is per se unreasonable.

Although the Board essentially agrees with appellant's statement of the holding in Kombol, it does not agree that Kombol supports appellant's

position here. The appeal bond regulation at issue in Kombol provided only that "[t]he officer to whom the appeal is directed may require an adequate bond to protect the interest of any Indian, Indian tribe, or other party involved during the pendency of the appeal" (25 CFR 2.3(b) (1981)). That regulation, inter alia, did not require proof that a party might suffer a measurable financial loss because of the appeal, lacked standards for determining the amount of a bond, did not allocate the burden of proof, and provided no right of appeal from the imposition of a bond. During the course of the Kombol litigation, the Department realized that the court was not sympathetic to the appeal bond regulation as it then existed. The Department amended the regulation in February 1989, specifically addressing the concerns the court would later discuss in its decision. The Board concludes that an appeal bond is not per se unreasonable, and that this case is not controlled by Kombol.

Appellant raises two specific arguments against the reasonableness of the bond. One argument is that the bond was unreasonable because appellant had only 15 days to post it. However, appellant's appeal from the imposition of the bond mooted the requirement that it post the bond in 15 days. As noted supra, when appellant filed its notice of appeal from the imposition of the bond, the Area Director's decision was automatically stayed pending the Board's decision. Appellant has now had over 2 months to obtain the resources to post the bond. Although the Board does not decide whether it is unreasonable to require a bond to be posted in 15 days, it concludes that a requirement to post an appeal bond within 15 days is not unreasonable when the filing of an appeal from the imposition of the bond automatically stays the time for posting it.

Appellant's second specific argument against the bond is that a cash or cash-equivalent bond is unreasonable. Appellant ties this argument to the fact that it is an environmental group with few resources.

The Area Director responds that cash, negotiable U.S. Securities, or an irrevocable letter of credit "are the standard forms of bonds permitted * * * in conjunction with any timber contracts. Surety bonds are no longer accepted because they do not work" (Response at 3). The parties disagree over whether an irrevocable letter of credit is the "equivalent" of cash. The Board finds it unnecessary to address this dispute because it finds unpersuasive appellant's argument that the form of the bond is unreasonable, especially in light of the Area Director's statement that the form of bond authorized are standard with respect to timber contracts.

The Board rejects appellant's argument that the bond is unreasonable under 25 CFR 2.5(a).

Appellant next argues that it should not be required to post a bond because any financial loss in this case is not "a direct result of the delay caused by an appeal" within the meaning of 25 CFR 2.5, but instead is the direct result of BIA'S decision to advertise the contract prior to the

expiration of the appeal period. 6/ Appellant contends that the decision was automatically stayed under 25 CFR 2.6(b) during the 30 days in which an appeal could be filed. 7/ It further asserts that the Superintendent was on notice, based on its stated concerns about the FONSI, that an appeal was likely.

Appellant does not dispute that there may be financial loss because of delayed implementation of the timber sale. Appellant's argument appears to be, however, that if BIA had followed its regulations, the timber sale would not have gone forward and there would have been no expectation that income would have been received before the conclusion of any administrative appeal. Apparently appellant contends that if there was no expectation of income, there is no justification for an appeal bond.

The Area Director responds that 25 CFR 2.6(b) does not apply in this case. He first argues that, although 25 CFR 163.26 allows an approving officer's actions to be appealed under BIA's general appeal regulations in 25 CFR Part 2 (Part 2), the action itself is not stayed pending that appeal because section 163.26 supersedes 25 CFR 2.6(b), which generally stays a BIA decision during the time in which it can be appealed.

[2] The Board agrees with the Area Director to the extent of holding that a specific provision in program regulations will normally supersede a general regulation dealing with the same subject. However, it cannot as readily agree with the remainder of the argument. The title of 25 CFR 163.26 is "Appeals under timber contracts and permits," and the second sentence states that the appeal "shall not stay any action under the contract" (emphasis added). The Board finds the regulation ambiguous at best concerning whether the advertising and/or awarding of a contract is an action "under" a contract. The regulatory history provides no guidance in this area because there is little discussion of section 163.26. 8/ In the

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6/ According to information before the Board, the FONSI was issued on July 1, 1994; the sale was advertised on July 15, 1994; and the bids were opened on Aug. 10, 1994. It is not clear whether the contract was awarded. An Aug. 11, 1994, letter to the Area Director from Plum Creek Manufacturing, L.P., sought intervenor status in the FONSI appeal because Plum Creek was "the successful bidder" for the timber sale contract. The Area Director's Aug. 11, 1994, letter imposing a bond suggests that the contract has not yet been awarded.

7/ Section 2.6(b) provides:

"Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

8/ The preamble to amendments to the timber regulations proposed in 1958 states only: "The more noteworthy of these changes include: provision of an appeals procedure for the first time * * *" (23 FR 9188 (Nov. 27, 1958)). See also 24 FR 7872 (Sept. 30, 1959), 48 FR 11459 (Mar. 18, 1983), and 49 FR 1686 (Jan. 13, 1984).

absence of any analysis supporting the reading of section 163.26 advanced here, the Board declines to hold that the section supersedes the automatic stay provision of 25 CFR 2.6(b) when the decision at issue is the initial advertising and/or awarding of a timber contract.

The Area Director next argues that section 2.6(b), and in fact all of Part 2, is superseded by CEQ's NEPA regulations, 516 DM, and the NEPA Handbook. The Area Director contends:

> Neither 40 C.F.R. 1500-1508 nor [DM] Part 516, provide for appeal of FONSI determinations under 25 C.F.R. Part 2. Instead, these regulations establish a "different" procedure: that is, "when a FONSI has been signed and notice published, as described in this chapter, NEPA compliance is completed." 30 BIAM Supplement 1, Part 5.
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> * * * "[T]he CEQ regulations do not prescribe any minimum time period between the signing of the FONSI and implementation of the action." 30 BIAM Supp. 1, § 5.5. The only requirement of delay between issuing the FONSI and implementing the action is the internal requirement of 10 working days for review by higher officials, unless the higher official advises concurrence in the FONSI. See 30 BIAM Supp. 1, § 5.5.
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> * * * * * *
>
> In any event, the procedures governing FONSI preparation and notice (for example 40 C.F.R. § 1506) are incompatible with and supersede the notice requirements of 25 C.F.R. Part 2. No administrative appeal of a FONSI may be taken.

(Response at 6-7).

With these arguments, the Area Director has injected a new issue into this appeal; i.e., whether there is a right to administrative review of a FONSI decision under Part 2. But for the Area Director's raising of this argument as justification for implementing the FONSI, the question would not be before the Board.

With regard to the effect of the NEPA Handbook, the Board has consistently held that the BIAM does not have the force and effect of law, and that provisions appearing only in the BIAM cannot be used against a party, but may be applied against BIA. See, e.g., Roble v. Sacramento Area Director, 23 IBIA 276 (1993), and cases cited therein. This holding is based on the requirements of 5 U.S.C. § 552, which provides:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by the agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided in this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[3] However, 25 CFR 163.27 specifically references the NEPA Handbook, part of the BIAM, and provides actual and timely notice to the public of the applicability of this section of the BIAM. The Board concludes that the NEPA Handbook can be relied upon, used, and cited as precedent in addressing timber sales from trust lands.

The Area Director first argues that Part 2 does not apply to BIA FONSI decisions because Part 2 is not referenced in the CEQ regulations or the DM. The Board rejects this argument. The CEQ regulations provide general guidance to all Federal agencies, while the DM provides slightly more specific guidance to Departmental bureaus and offices. There is no reason for either of these publications to refer to any applicable appeal provisions for specific offices. The fact that neither the CEQ regulations nor the DM reference Part 2 does not determine whether there is a right of appeal under that Part.

The Area Director also argues that the NEPA Handbook supersedes Part 2 by establishing a "different procedure" for FONSI review. 25 CFR 2.3 (b) states that Part 2 "does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." Similarly, 43 CFR 4.331 establishes a right to appeal to the Board from an Area Director's decision "except * * * (c) Where otherwise provided by law or regulation." 9/

Although section 5.1 of the NEPA Handbook states that "when a FONSI has been signed and notice published, * * * NEPA compliance is completed," "NEPA compliance" is not defined. The Area Director's argument suggests that when the FONSI is signed and notice is published, the FONSI is final for the Department without administrative review.

This reading of section 5.1 is inconsistent with the position taken by the Area Director in Poo-sa'-key v. Portland Area Director, 25 IBIA 181 (1994), in which he informed an appellant that his FONSI decision could be appealed to the Board. Although the Board has held that a BIA official can change an interpretation of law in order to correct prior error, it has also held that any such decision must clearly state how the prior interpretation was erroneous in order to show that the change is not arbitrary or capricious. See, e.g., Hopi Indian Tribe v. Director, Office of Trust and Economic

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9/ One example of a "different administrative appeal procedure" is found in 25 CFR 88.1(c), which makes Area Director decisions approving, disapproving, or conditionally approving an attorney contract with an Indian tribe final for the Department without further review. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989).

Development, 22 IBIA 10, 16 (1992). No reasons whatsoever have been offered for the present change in position.

The position also appears to be inconsistent with BIA's actions in this case prior to the filing of the response to appellant's supplemental statement. The Superintendent obviously believed the FONSI could be appealed under Part 2, because he stated in section V of the FONSI, Implementation Date and Appeal Opportunities:

> This Decision Notice and [FONSI] is subject to appeal pursuant to 25 CFR Subchapter A, Part 2. A written notice of appeal must be filed within 30 days following the date of the first newspaper publication of the decision notice. The appeal must be filed in accordance with 25 CFR 2.9.

In accordance with these instructions, an administrative appeal under Part 2 is presently pending before the Area Director. It would seem unlikely that the Area Director would have accepted that appeal and allowed an opportunity for briefing if he intended to dismiss the appeal on the grounds that there was no right to appeal from the Superintendent's FONSI decision, especially considering the fact that he then imposed a bond to protect the Tribes' interests during the period the appeal was under consideration. If there were no right to appeal, an immediate dismissal for that reason would have obviated any need for a bond.

In the context of this case, the Board does not find persuasive the argument that the NEPA Handbook establishes a "different procedure" for consideration of FONSI decisions by making those decisions final for the Department.

The Area Director next contends that the CEQ regulations do not prescribe a minimum time period between the signing of a FONSI and its implementation and that section 5.5 of the NEPA Handbook requires only a 10-day review period before implementation of a FONSI signed by a Superintendent. This argument appears to be that because the 10-day waiting period established in the NEPA Handbook is inconsistent with the stay provision of 25 CFR 2.6(b), section 2.6(b) is superseded by the NEPA Handbook.

The Board agrees that the CEQ regulations do not establish a minimum time period for implementation of a FONSI but concludes that this fact is not determinative for the same reasons as were discussed supra.

The major problem with the portion of this argument based on the NEPA Handbook is that it overlooks other provisions in section 5.5. The section also states: "If circumstances permit, however, it is generally advisable to allow a reasonable time period for interested parties to make known their views on the FONSI before implementing the action." Although the timing provisions of the NEPA Handbook and Part 2 are clearly different, the Board believes that those differences can be quite easily reconciled, with the result that effect can be given to both the NEPA Handbook and Part 2. The NEPA Handbook encourages delayed implementation of FONSIs in appropriate

cases, but allows implementation in 10 days when necessary or when there is no opposition. 25 CFR 2.6(b) ordinarily stays action on any matter appealed under Part 2, but 25 CFR 2.6(a) provides a mechanism for placing a decision into immediate effect when necessitated by concerns over "public safety, protection of trust resources, or other public exigency." If it is necessary to implement a FONSI quickly, procedures are available under Part 2 to do so.

Based on the arguments presented in this case, the Board declines to hold that the NEPA Handbook supersedes Part 2 simply because the NEPA Handbook allows a FONSI to be implemented in 10 days.

Finally, the Area Director contends that because the notice provisions in the NEPA Handbook and CEQ regulations and those in 25 CFR 2.7 are incompatible, no administrative appeal may be taken from a FONSI.

The notice provisions in section 2.7 and those in the NEPA Handbook are different. The Board cannot agree, however, that those differences amount to "incompatibility." As discussed supra, to the extent that the NEPA Handbook requires notice to be given to different people in different ways than would be necessary under Part 2, the NEPA Handbook controls. That fact does not, however, require a finding that Part 2 is completely superseded.

The Area Director has failed in this case to persuade the Board that there is no right of appeal from a FONSI decision under Part 2. The Board is also disturbed that the arguments raised ignore the fact that interested persons to this NEPA proceeding were specifically informed that there was a right of appeal under Part 2. Based on its analysis of the Area Director's arguments on this issue, the Board declines to hold that the FONSI decision was not governed by 25 CFR 2.6(b). It therefore concludes that advertisement of the timber sale prior to the expiration of the appeal period violated the stay provision.

Despite this conclusion, the real question that must be decided is whether BIA's error was the proximate cause for any financial loss that might be incurred by the Tribes. The Board concludes that it was not. If there had been no appeal from the FONSI, the timber sale could have been advertised and awarded, and harvesting could have begun during calendar year 1994. 10/ The advertisement would have been delayed, at most, an additional 20 days, or until approximately August 5, 1994. Regardless of whether BIA implemented the FONSI prematurely, but for appellant's appeal, the decision would have already been implemented, and the Tribes would already have received income under the sale contract.

Although appellant's argument concerning the expectation of income has a superficial attraction, and despite the fact that the Area Director's

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10/ Although the Superintendent spoke in terms of income during fiscal year 1994, the Board does not know what fiscal year the Tribes use.

arguments are not persuasive, the Board concludes that the proximate cause of any financial loss to the Tribes is appellant's appeal of the FONSI. 11/

Appellant also raises other arguments based on the failure to await the expiration of the appeal period before implementing the FONSI. It states that this timber sale has been under consideration since January 1991, and has been withdrawn and revised three times. Appellant asserts that, in view of the already lengthy delays, "any delay caused by the appeal of this timber sale is minimal by comparison" (Notice of Appeal at 3). This argument is unpersuasive. Regardless of how long the sale had been contemplated, the FONSI was approved in time to be implemented during 1994. Again, but for appellant's appeal, performance would have begun under the sale contract. Any delays at this point are caused by the appeal, the precise situation addressed by 25 CFR 2.5.

Appellant next contends that "any loss to a contractor from delay of this sale does not lie with the appellant" (Ibid.). This argument is not relevant. Appellant is not being asked to post a bond to protect the financial interests of the contractor; rather the bond is to protect the financial interests of the Tribes.

Finally, appellant raises two arguments against the bond based on an assertion that the Tribes will actually benefit from the appeal. It first argues "that the wholesale value of sawlogs has increased in Montana from $527 million in 1992 to $724 million in 1993 * * *. Delay of this timber sale pending compliance with NEPA stands to increase revenues to the * * * Tribes" (Ibid.). In response to this argument, the Area Director presents evidence indicating that the value of sawlogs decreased in 1994.

The Board takes official notice of the extreme volatility of the timber market. Even assuming that increased revenues to the Tribes could ultimately be assured, which is impossible without a crystal ball, the fact remains that the Tribes have lost revenue in 1994 because of the FONSI appeal, and will have to make up for this loss through the use of other resources.

Appellant also asserts that “[d]elay of this timber sale [will] result in an overall net benefit to the tribes by ensuring compliance with environmental laws that will protect the overall diversity of tribal lands” (Notice of Appeal at 3), and that “the non-commercial forest values that [it] seeks to protect through its appeal * * * are encompassed within the interests of the Indian beneficiaries that the federal trust created by [25 U.S.C.] §§ 406-407 is designed to protect” (Supplemental Statement at 9). Appellant argues that Congress intended that Indian timber be managed not “solely in terms of immediate monetary gain,” but also “for values

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11/ In effect what the advertisement of the timber sale has done is to provide a concrete measure of damages for the amount of the potential financial loss. Without the advertisement and the proof that it provides of the terms under which a willing purchaser would contract, the amount of potential damages would have been speculative to some extent.

other than the sale of timber where such uses further the goals of trust" (Ibid.). Appellant concludes that "the numerous * * * environmental benefits that [it] seeks to protect in its appeal accrue to the Indian beneficiaries and their heirs. Moreover these gains offset any short-term financial loss that might result from delaying the sale until the BIA satisfies the requirements of NEPA" (Ibid.).

The Area Director responds that this timber sale must be judged by the standards of 25 U.S.C. § 407, which concerns the sale of tribal timber, not section 406, which concerns the sale of allotted timber, and from which appellant quotes. 12/

The Board does not address the Area Director's response because it finds that appellant's belief that the protection of overall diversity of tribal lands and of non-commercial forest values is to the Tribes' benefit, even assuming arguendo that these issues are encompassed within sections 406 and 407, is simply not relevant to a determination of whether the Tribes may be financially harmed by the delay of the timber sale caused by this appeal.

Therefore, the Board rejects appellant's arguments that a bond is not appropriate.

Appellant's second major argument is that the Board should waive a bond "in the interests of justice" (Notice of Appeal at 1) because appellant does not have the resources to post a substantial bond. Appellant contends:

> It is against public policy to require [a bond from] * * * a non-profit group, with no financial stake in the outcome of this case[, which seeks] only to require that the United States' environmental protection laws be enforced upon a public land management agency. To require anything more than a

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12/ Section 406(a) provides in pertinent part:

"The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior * * *. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

Section 407 provides in pertinent part:

"Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use."

> nominal bond runs contrary to NEPA's purpose of promoting public involvement and would discourage citizen suits. [13/]

(Id. at 1-2).

Appellant cites Natural Resources Defense Council, Inc. v. Morton, 377 F. Supp. 167 (D.D.C. 1971), and several similar cases, in support of its position. The Board has carefully read all of the cases cited by appellant and finds there are two significant factual differences between this case and the cases cited.

First, each of the cited cases concerns whether a Federal court would require the posting of security under Rule 65(c) of the Federal Rules of Civil Procedure in order for a non-profit organization plaintiff to obtain a restraining order or injunction in Federal court. 14/ In summary, the courts have generally determined that requiring the posting of more than nominal security would deprive citizens and concerned groups of the opportunity to obtain judicial review and would thwart the intent of Congress to encourage citizen suits under NEPA.

The present case involves administrative review of an agency decision. Appellant presents no analysis as to why administrative procedures before the Department must be identical to the procedures employed by the Federal courts. The intent of the courts in creating this exemption was clearly to provide a judicial forum for citizen suits under NEPA. This intent is consistent with NEPA's expressed goal of encouraging citizen participation. However, judicial review is not limited by the imposition of an appeal bond in an administrative forum. Appellant has the option of filing suit in Federal court. If the court accepts the case, appellant would then be subject to the rules of that court, rather than those of the Department.

The Board's initial belief that the Department is not prohibited from imposing an appeal bond in an administrative proceeding under NEPA because of the possibility that a Federal court would not require the posting of

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13/ 42 U.S.C. § 4331(a) provides in pertinent part:

"The Congress * * * declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures * * * in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

14/ Rule 65(c) provides:

"(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

security in a judicial proceeding, is strengthened by its analysis of the second factual difference between this case and the cases cited by appellant, i.e., the fact that none of those cases involved the Department's management of Indian trust lands.

The cases appellant cites concerned lands owned in fee by the United States, or privately owned fee lands that were in some way impacted by the expenditure of Federal funds. Here, the lands involved are owned by the United States in trust for the Tribes. In taking actions relating to these lands, the Department is acting in a fiduciary capacity of the highest nature. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Based upon appellant's statement that it is merely trying to enforce Federal environmental protection laws "upon a public land management agency" (Notice of Appeal at 2), it appears that appellant equates the Department's responsibilities as an owner/manager of public lands with its responsibilities as a trustee of Indian lands. 15/

The Board has held, however, that Indian lands are not public lands, and the laws applicable to public lands do not necessarily apply to trust lands. See, e.g., Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353, recon. denied, 15 IBIA 271 (1987); dismissed, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990); aff'd, 925 F.2d 490 (D.C. Cir. 1991) (requirements of statutes governing rights-of-way on the public lands are not to be read into statutes governing rights-of-way on Indian trust lands). As this difference between public lands and Indian trust lands relates to this case, the Board is not aware of any regulation allowing the imposition of an appeal bond in relation to administrative review of NEPA challenges to the use of the public lands. The fact that the Department has promulgated regulations which allow the imposition of a bond in relation to the use of Indian trust lands shows that it views its responsibilities in this area differently.

Appellant contends that the Area Director believes the appeal bond regulation supersedes NEPA requirements. The Board disagrees. There is no question of "superseding," here; rather, the issue is one of reconciling two very important Federal policies--the trust responsibility and environmental protection--in the Department's administrative proceedings. The trust responsibility requires the Department to consider issues in addressing actions on Indian trust lands that it would not normally consider when taking actions on the public lands. These different issues arise in all cases, not just ones under NEPA. Not to consider these issues would subject the Department to suit for breach of trust.

15/ The Board is aware that in Davis, supra, the court based its decision that Indian trust lands were subject to NEPA in part on its statement that the Department also held public lands in trust for the people of the United States. The Board is not aware of any judicial decision holding the United States to the same high fiduciary standards in regard to its actions on the public lands as the Supreme Court has required in regard to its actions relative to Indian trust lands.

The trust responsibility requires the Department to act in the best interest of the beneficial owners in any action it takes in regard to Indian trust land. Here, the tribal owner expected income in 1994 from the timber sale. The fact that no income will be generated in 1994 as a result of appellant's appeal is a fact which the Department must address in acting in the best interests of the beneficial owner.

After considering appellant's argument for a waiver of the bond in light of the important policies expressed in NEPA and the trust responsibility, the Board declines to waive the bond.

Appellant's final group of arguments allege that BIA has hampered appellant's efforts to obtain review of the merits of the FONSI decision. Appellant first asserts that BIA failed to respond to two requests, dated September 20 and September 23, 1994, for financial information necessary for the preparation of this appeal. The Area Director submits evidence that a response was provided on September 29, 1994, informing appellant that some of the requested information was protected by Federal law from public disclosure and the remaining information would be provided. In his response to appellant's supplemental statement, the Area Director clarifies that the Federal law prohibiting disclosure is the Privacy Act, 5 U.S.C. § 552a. The Board finds that appellant received a response; it was just not the one it wanted.

Furthermore, the Board concludes that, contrary to appellant's assertions, the information it requested in the September 20 and 23 letters was not relevant to this appeal. Appellant requested: "1. Financial statements for the BIA Timber Program for the [Tribes] for the years 1991 through 1994. 2. Size of proposed cutting units and silvicultural prescriptions for the * * * timber sale" (Sept. 20, 1994, letter at 1), and 3. "a copy of the Timber Sale Prospectus" (Sept. 23, 1994, letter at 1). Items 2 and 3 relate to the FONSI appeal, not to the imposition of a bond. Item 1 is not relevant to the bond appeal, and, based on the limited information before the Board, does not appear to be relevant to the FONSI appeal. Even assuming there was delay by BIA in responding to the letters, a matter the Board does not decide, appellant was not harmed in preparing this appeal by any such delay. 16/

Appellant also suggests "that the appeal bond mechanism is another method being used to discourage [its] pursuit of administrative relief" (Supplemental Statement at 8). Realistically, the imposition of a bond may well result in a decision not to pursue administrative remedies or to seek judicial review immediately. This is true whenever a bond is required and regardless of the nature of the underlying controversy

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16/ Any delay in BIA's response may be attributable to the fact that appellant sent its letters to the Area Director, not to counsel representing the Area Director. The Board agrees with the Area Director that appellant should have known that inquiries in on-going litigation in which counsel has entered an appearance should be directed to counsel, not the person represented.

Under the circumstances of this case and based upon the conclusory arguments made by appellant, the Board cannot conclude that a bond was imposed for the purpose of discouraging appellant's substantive appeal, rather than protecting the Tribes' financial interests.

Appellant did not challenge the specific amount of the bond, but the Board addresses this issue under its authority to correct manifest injustice or error. 17/ The Superintendent based his request for a $29,000 bond on $27,619 in interest which would be lost by the Tribes, and $1,385 for sale package review and reconciliation, copying and mailing, and readvertisement. Neither the Superintendent nor the Area Director provided information concerning whether the $1,385 would be spent by the Tribes or by BIA. However, the description of the sale package review and reconciliation amount states that this function would be performed by a "GS-9 Forester," which suggests that the expense would be incurred by BIA. Furthermore, as discussed supra, these funds were initially expended in violation of the stay provision of 25 CFR 2.6(b).

Even if the Board were to hold that financial losses that might be sustained by BIA could be covered in an appeal bond, a holding it specifically does not make, the fact that these costs can be considered financial losses only because BIA did not delay the timber sale advertisement until the appeal period had expired convinces the Board that they should not be covered in any bond.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Portland Area Director's August 11, 1994, imposition of an appeal bond is docketed, and the decision is affirmed, although the amount of the bond is reduced to $27,619.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

17/ 43 CFR 4.318 provides:

"An appeal shall be limited to those issues which were * * * before the official of the Bureau of Indian Affairs on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."